Supreme Court of the United States

OCTOBER TERM, 1942.

No. 183.

THOMAS J. PENDERGAST, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

No. 186.

ROBERT EMMETT O'MALLEY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF ON BEHALF OF PETITIONERS THOMAS J. PENDERGAST AND ROBERT EMMETT O'MALLEY.

JOHN G. MADDEN,
Fidelity Building,
Kansas City, Missouri,
R. R. BREWSTER,
Federal Reserve Bank Building,
Kansas City, Missouri,
JAMES E. BURKE,
Fidelity Building,
Kansas City, Missouri,
Counsel for Petitioner,
Thomas J. Pendergast.
JAMES P. AYLWARD,
Commerce Building,
Kansas City, Missouri,
RALPH M. RUSSELL,
Commerce Building,
Kansas City, Missouri,
Counsel for Petitioner,
Robert Emmett O'Malley.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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A.

STATEMENT OF THE CASE.

The argumentative statement of the United States, in so far as it purports to supplement the factual statement of petitioners, is constituted of (a) the argumentative and prejudicial conclusions and inferences of counsel; (b) asserted facts appearing in opinions of the trial court (and of individual members thereof) in this and other proceedings, unsupported by proof in this record, and (c) matters

(e.g., proceedings in open court, and briefs and representations of counsel, incident to the procurement of the decree of February 1, 1936) allegedly judicially noticed by the trial court, with the limitation (R. 924), however, that they should not be considered "to connect the defendants with the contempt charged" (although now sought to be utilized by counsel solely for that prohibited purpose), which have never been incorporated in any bill of exceptions. Facts, conclusions, argument, and references to opinions below are inextricably intermingled. It is difficult, in analyzing the statement of the United States, to differentiate between proof and conclusional inferences. It would extend this presentation interminably if we were to attempt to specify each departure by counsel from the proper record.

We do feel obligated, however, to point out two respects wherein the record facts have been by the United States disregarded: (1) the statements of counsel (even if properly judicially noticed) have been assumed to be self-proving (*Br. of the United States, pp. 9, 10*); (2) the judicial limitation imposed upon the matter allegedly judicially noticed (*Br. of Petitioners, pp. 6, 7*) has been ignored without exception. Supplemental to these observations it may be noted that the United States attorney was not requested to act as *amicus curiae* (*Br. of Petitioners, p. 12*), and it may further be suggested that the claim that McCormack concealed the transactions in question, by perjury or obstructive tactics before the grand jury, is entirely unsupported by the record (*Br. of Petitioners, p. 10*). There is not the slightest proof that McCormack before the grand jury in 1939 acted pursuant to any previous conspiracy. *No act, therefore, of O'Malley or McCormack, in that connection, is chargeable to Pendergast.* It may be added that if the secrecy implicit in any improper transaction should be construed as evidence of a conspiracy to conceal, and thereby to toll the statute of limitations, the latter statute would be manifestly meaningless.

The statement of the United States assumes that the misconduct charged and proved consisted of representations of

counsel. Such was not the offense alleged (R. 1). Counsel go so far as to quote the information, as to the alleged fraudulent, corrupt, unlawful and contemptuous procurement of the decree, without informing the court that such general allegations (R. 4) were followed by particulars in limitation thereof (*Br. of the United States, p. 25*). The unmistakable fact shown by the evidence, and ignored by the United States, is that the misconduct involved was the corrupt use of money. That occurred at points remote from the court room. Absent that incident, however, there could be no arguable pretense of contempt.

B.

ARGUMENT.

Point I.

The conduct of each petitioner (charged or proved) did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and did not render him punishable for contempt upon information; the conviction below must, therefore, be reversed.

The United States meets the argument of petitioners by misstating it. We assert that the misbehavior punishable by summary process must occur in the presence of the court; we assert that the accused, at the time of misbehavior, must have been in the presence of the court. We do not limit the scope of misbehavior to tumultuous or disorderly acts. We further decline to concede that the only exception to the doctrine suggested is an *obiter* statement in *Ex parte Robinson*, 19 Wall. 505, 511 (*Br. of Petitioners, p. 22*). In all candor we vigorously assert, moreover, that under the statute of 1831 misbehavior summarily punishable is so punishable only because committed in the presence of the court or in the required geographical proximity thereto (*Br. of United States, p. 21*).

Counsel in opposition purport to disregard the unity of the phrase "the misbehavior of any person in their presence * * *" (Section 268, Judicial Code, 28 U. S. C. A., Sec. 385). This requirement is not separable; it is inseparable. The accused must be in the presence of the Court at the time of misbehavior; the disruptive misbehavior, interruptive of judicial process, must occur in the presence of the

court.[1] We are justified in referring back to the argument of Buchanan in the Peck case. He was the author of the Act of 1831. It is significant that he entitled that Act one *not* of limitation upon previously existing judicial power, but one declaratory of such judicial power.[2]

Since the views of Buchanan were thoroughly disclosed during the trial of Peck, we are further justified in alluding to his conception of the law in construing the Act of 1831. It would require remarkable temerity on the part of counsel to suggest that Buchanan would have countenanced the instant proceeding.[3] The very doctrine of necessity, the theory that a court of the United States is vested only with the power to enable it to exercise such authority in contempt as to permit it to continue with its work, comes from Buchanan.[4] In this connection we cannot refrain from the suggestion that the trial court below, in the instant proceeding, strayed into an enlargement of its jurisdiction. The comments of Buchanan are particularly appropriate.[5] If the power asserted by the trial court were sustained, every evil of which Buchanan complained would be a necessary incident. It will be recalled that one of the chief burdens of the complaint of Buchanan was the insistence by Peck that the refusal of Lawless to reply to interrogatories was either a new offense or an aggravation of the former alleged offense.[6] We find in the instant proceeding an amazing parallel. Because these petitioners did not testify, the

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[1] The rule as to perjury is, we think, significant. Perjury in open court is not contempt unless the disruptive, the interruptive, element is present. *Ex Parte Hudgings*, 249 U. S. 378. It is difficult to understand how representations of counsel innocently made (or, for that matter, guilty representations of petitioners, had they been made) could constitute contempt when similar statements under oath would have been non-contemptuous. The rule as to order and decorum controls.

[2] Stansbury, Trial of Peck, p. 592.

[3] Stansbury, Trial of Peck, p. 430.

[4] Stansbury, Trial of Peck, p. 436.

[5] Stansbury, Trial of Peck, p. 436.

[6] Stansbury, Trial of Peck, pp. 436, 437.

trial court ventured to suggest that "they stood on their technicalities" (R. 53). It is, to say the least, remarkable that defendants, asserting fundamental rights to constitutional liberty, should be thereby derided for standing on "technicalities." The dissenting opinion below disposes, we apprehend, of that issue (R. 1212).

It is suggested that the claimed misbehavior of petitioners "interrupted the orderly conduct of the court's business" (*Br. of United States, p. 23*). This has been heretofore discussed (*Br. of Petitioners, pp. 34, 35*). The *Nye* case is the complete answer. We shall not further review attempted distinctions of the opinion last cited since they have been anticipated (*Br. of Petitioners, pp. 30, 31, 32, 33, 34, 35, 36*). It may be suggested, however, that the United States persistently confuses contempt and conspiracy (*Br. of Petitioners, pp. 37, 38, 44, 45, 46, 47, 48, 49*). Would Buchanan, as indicated in his argument, have regarded a conspiracy (as distinguished from acts of misbehavior) as a continuing offense in the presence of the court?

The United States attempts a grammatical argument (*Br., p. 31*). We submit that the argument defeats itself. In the same way that the phrase "misbehavior of any of the officers of said courts in their official transactions," must be construed in the conjunctive, so must also the phrase "the misbehavior of any person in their presence" be construed in the conjunctive. The misbehavior must there occur; the physical presence of the accused is there required. The *person* must have been "in their presence." These conjunctive necessities originate inevitably from the theory of the Act of 1831, and for this reason, viz: Buchanan contemplated in the Act of 1831 (as disclosed in his argument in the Peck case) that there was no common law criminal jurisdiction vested in the courts of the United States, and that contempt jurisdiction was necessarily limited to those necessities which were essential to enable such courts to proceed with their work. That is the "order or decorum" argument. It was accepted without question until the *Toledo* decision in 1918.

Mr. Justice Holmes never departed from the assertion of that fundamental doctrine. If it is assumed that no court of the United States has any authority in contempt other than that inherent authority required to permit it to continue its judicial functions, every issue of the power of contempt is solved simply, plainly and practicably. The ordinary doctrines of criminal law, of conspiracy, of fallacious "analogy to the doctrine of constructive presence as developed in the criminal law," are manifestly inapplicable to contempt.[7] It is essential to the administration of judicial process that the person physically present before the court, guilty of misbehavior, disruptive of its orderly processes, should be summarily punished. It is not essential, however, that any person (absent from the court room) *responsible* for such conduct, under doctrines of conspiracy or otherwise, should be thus punished. Such a person is subject to prosecution by the usual process of indictment. Blackstone recognized that prosecution by summary contempt procedure was not in accord with the genius of the common law. It is scarcely arguable that such a method of prosecution is reconcilable normally with the constitutional restrictions in this country. Such a power can be predicated only upon necessity, and cannot extend beyond the necessity which creates it. That is self-evident; that is unmistakable. That was the purpose of the Act of 1831.

As Buchanan indicated so vigorously before the Senate, no man should be judge in his own cause. The validity of that argument is graphically demonstrated in the instant proceeding. In point of fact the elevation of the moral standards of a given person is almost the test of his partisan indignation if he has been imposed upon by corrupt practice. There is no man free from prejudice; and there is no man whose emotions are so inflamed as a judge of high character who feels that he has been made, or utilized as, the tool of fraud. We do not challenge the natural indignation,

[7] Thomas, Problems of Contempt of Court, 1934 Ed. P. 63.

or the propriety thereof, of the trial court in the instant proceeding; we *do* challenge the right of the trial court, suffering from that indignation, to venture to determine these issues when it was, in effect, both the accuser and the judge. It is not strange under those circumstances that the Congress by the Act of 1831 intended to deprive forever the courts of the United States of the power of thus determining their own controversies.

It is unnecessary to review the authorities cited by the United States. An examination thereof will reveal that none is pertinent to the issue here presented. We have heretofore indicated that our position is not limited to tumultuous interference with the conduct of judicial business; our position is that there must be misbehavior in the presence of the court whereby the latter is interrupted in the transaction of its usual affairs. It is conceded that there was no such interference in the instant case. There was no misbehavior in the presence of the court; petitioners were not in the presence of the court. Their misconduct occurred elsewhere. It may be noted (contrary to the assumption of counsel) that *Nye* appeared, and testified, in attempted consummation of the fraud long prior to any charge of contempt (*Nye* R. 154, 155, 156). The argument of the United States, moreover, in attempted distinction of the *Nye* case, has been anticipated (*Br. of Petitioners, pp. 30, et seq.*) See *Coll* v. *United States*, 8 Fed. (2d) 20. Other issues have been reviewed. We have commented upon the attempt of the United States to use proof "judicially noticed" for purposes beyond its limitation by the trial court. Were all such limitations disregarded, however, it is plain that petitioners were not guilty of misbehavior subjecting them to summary punishment under the first section of the Act of 1831. The bribery of O'Malley, like the improper influence visited upon Elmore (*Nye* case), occurred at points remote from the court room; absent that misconduct no arguable contempt occurred; with that misconduct no contempt punishable by summary process occurred. Indictment was the only remedy.

Point II.

The prosecution of petitioners under the information was barred by the Statute of Limitations, since any and all acts of alleged contempt occurred more than three years next before the filing of the information.

The position of the United States upon this issue is difficult to comprehend. There was utterly no showing in the instant proceeding of an agreement to conceal or of any conduct of concealment pursuant thereto. No act of alleged concealment is, therefore, chargeable to Pendergast. In point of fact the United States is estopped from such contention by reason of the contrary evidence of its own witness (R. 717, *et seq.*). *Cartello* v. *United States*, 93 Fed. (2d) 412, l. c. 415.

Counsel urge the novel theory that the offense committed was not completed until its fruits were realized (*Br. of United States, p. 38*). Realization of profits is not the test of an offense. In point of fact the entire argument is predicated upon a misconception of the record: Street, who had made the prior payments to Pendergast in 1935 and 1936, was long dead. There is not the slightest evidence that either petitioner, after October, 1936, requested, received or anticipated further payment. Aside from the sum, reserved under the decree of February 1, 1936, "for the purpose of taking care of the future expenses of the custodian and other matters", there was nothing "left undistributed under the forthwith provision of the decree to the trustees or to the companies" (R. 781). The implication is (and there is no proof to the contrary) that the distribution to the companies and to the trustees for the companies was expeditiously made upon the entry of the decree of February 1, 1936. Counsel for the United States cite no authorities to sustain the theory, for that matter, that concealment tolls the statute of limitations (*Br. of Petitioners, pp. 48 et seq.*). We assert that there is no such authority. We further assert that there is no justification in law for the intimation that reform is essential before the statute of limitations begins to run (*Br. of United States, p. 41*). The

distinction between conspiracy and misbehavior has been reviewed (*Br. of Petitioners, pp. 37 et seq.*).[8] The fallacy of the argument predicated upon the opinion of Mr. Justice Holmes in the *Gompers* case has been discussed (*Br. of Petitioners, pp. 40 et seq.*). There is neither reason nor authority for the contention that this prosecution is not barred.

Point III.

The convictions below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioners under the information is in violation of an agreement with the United States.

Further comment in this connection is scarcely necessary. As we have suggested heretofore, the issue is not whether the United States attorney bound or attempted to bind the statutory court; the issue is that the United States attorney *did* bind the United States (*Br. of Petitioners, p. 51*). There is utterly no basis for the suggestion of counsel that "there is grave doubt whether the agreement here asserted covered the present offense" (*Br. of United States, p. 49*). It was explicitly admitted in open court that the agreement provided for non-prosecution of any contempt charge (R. 840, *et seq.*). Thus it was alleged, and admitted, that the agreement contemplated "that there would be no indictment *or other prosecution* of this defendant on account of any alleged contempt of court * * *". (R. 841, 842, 843). This agreement was confirmed in open court by the United States attorney (R. 845), by the Chief of the Appellate Section of the Criminal Division of the Office of the Attorney General of the United States (R. 848), and by the United States attorney who had made the original agreement (R. 852, 853). Unless the United States is to break faith, this prosecution is barred.

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[8] Counsel for the United States would seek to charge petitioners with contempt, but punish them for the substantive offense of conspiracy. As to the latter offense, however, even had it been charged, petitioners would have been entitled to constitutional safeguards, including trial by jury.

Point IV.

The court below was without jurisdiction to entertain this proceeding; and the conviction of petitioners was not validated by the circumstance that one of the members of the purported statutory court, as then district judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation.

Whether the three-judge court had inherent authority to take such summary action as was necessary to enable it to go on with its work is academic here. *It had no right to exercise criminal jurisdiction.* It was unauthorized to entertain a criminal prosecution for contempt. No one of the judges of that court was, at the time of the institution or entertainment of this proceeding, judge of the Central Division of the Western District of Missouri. That is conceded (R. 22). The rules for the division of business, if not subject to collateral attack (*Br. of United States, p. 55*), are undoubtedly a basis for a direct attack upon the jurisdiction of a judge or court unauthorized to act thereunder. Such attack has been here made.

The trial court has interpreted its own rules (R. 22, *Steers v. United States*, 297 Fed. 116, l. c. 118). That court has conceded that, if the offense charged involves an independent proceeding, not incidental to the original rate litigation, it was without jurisdiction (R. 22). We submit that there can be no question but that the offense charged is not incidental, but independent, and hence under the concession of the trial court not reviewable thereby (*Br. of Petitioners, pp. 52 et seq.*).

It is argued, however, by the United States, that the action of the court below, despite its lack of jurisdiction, was validated by the circumstance that one of its members, at the time of the institution of the original insurance rate litigation, was judge of the Central Division of the Western District of Missouri. It is not contended that any member

of the court below was thus judge of such Division at the time of the institution of the instant proceeding. As we have said before, therefore, jurisdiction was plainly lacking. This Court has so indicated. *Pendergast* v. *United States*, 314 U. S. 574, 86 L. Ed. 55. Even, however, if it were conceded that a single member of the trial court was qualified to determine this cause, we contend necessarily that the participation of unauthorized judges therein was erroneous. Such participation would violate every princple of due process.

That doctrine is particularly applicable to this proceeding. Thus the United States contends that Judge Reeves was qualified to pass upon these issues. The record discloses, however, that his participation was slight. Judges Stone and Otis had prejudged the cause (R. 807, 808). To argue (as did the trial court) that each act of three judges was the independent conduct of each is an absurdity (R. 1179). Because, in a given case, twelve qualified jurors should have sat thereon, would it be argued that the unlawful participation of others unqualified would not be error? We submit that it is incontestable that the judgment of three men is not the judgment of each; that the opinion of each is necessarily influenced and affected by the opinions of the others; and that no person accused of crime has enjoyed the benefits of due process if unqualified persons have participated in his trial and sentence. The issue is not whether the judgment is invalidated jurisdictionally (as in the authorities cited by counsel for the United States); the issue is whether or not such participation is not error when properly assigned.

The trial court was without jurisdiction.

CONCLUSION.

The issue in the instant proceeding is not the moral conduct of petitioners. The issue is this: Was each petitioner guilty of a contempt, punishable upon information, unbarred by limitations, unaffected by the agreement of the United States which precluded the prosecution instituted, and unimpaired by the initial lack of jurisdiction of the trial court? Upon each of the bases suggested the conviction below must be reversed.

Respectfully submitted,

JOHN G. MADDEN,
Fidelity Building,
Kansas City, Missouri,

R. R. BREWSTER,
Federal Reserve Bank Building,
Kansas City, Missouri,

JAMES E. BURKE,
Fidelity Building,
Kansas City, Missouri,
Counsel for Petitioner,
Thomas J. Pendergast.

JAMES P. AYLWARD,
Commerce Building,
Kansas City, Missouri,

RALPH M. RUSSELL,
Commerce Building,
Kansas City, Missouri,
Counsel for Petitioner,
Robert Emmett O'Malley.